No. 87-1175

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

PARKER-HANNIFIN CORPORATION,
Petitioner,

v.

ANNIE C. KISER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit (Appeal No. 87-1023)

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The sole question actually presented is this: Whether the Court of Appeals properly determined that the district court erred in dismissing the action without considering plaintiff's motions to amend her complaint to remedy an incomplete statement of diversity jurisdiction.

The questions asserted by petitioner are part of the "gamesmanship" and lack of "candor with our courts" noted by the Court of Appeals (831 F.2d 423, 429). The court below did *not* sanction any federal Doe practice. On the contrary, the Court of Appeals authorized respondent to seek leave to amend her complaint as to the Doe defendants, reversed the dismissal order and remanded with directions to grant Kiser's motion to amend her complaint to allege petitioner's state of incorporation as Ohio.

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The respondent Annie C. Kiser, individually and as Administratrix of the Estate of Everett W. Kiser, submits that the petition for writ of certiorari should be denied for the reasons set forth below.

JURISDICTION

The jurisdiction of the district court was based on diversity of citizenship. 28 U.S.C. § 1332. The first amended complaint (Appendix 26a, cited as "App.") alleged that: Plaintiff Kiser is a citizen of North Carolina and was appointed administratrix of her husband's estate in North Carolina. Defendant General Electric (since dismissed) is a corporation with its principal place of business in Connecticut. Defendant Parker-Hannifin (petitioner)

and defendant Eaton (since dismissed) are each corporations with their principal places of business in Ohio.

The one omission was the failure to state the places of incorporation of the defendants, although it was alleged that none was incorporated in North Carolina. App. 160a. Petitioner Parker-Hannifin is the sole remaining defendant and, as noted in the opinion below (831 F.2d 423, 428), petitioner is incorporated in Ohio.

Through the inadvertent use of routine California practice,* the first amended complaint added "DOES 1-5" in the caption. App. 26a. The fictitious defendants were not otherwise mentioned except to state that they were not incorporated in and did not have their principal place of business in North Carolina. App. 27a. As noted in the opinion below (831 F.2d at 426), the Doe defendant issue was not raised in the district court until after dismissal of the action. App. 154a. The dismissal did not mention any Doe issue. App. 124a-128a. Nor did the district court mention that issue in denying reconsideration. App. 172a-176a. The Court of Appeals initially granted Kiser's request to dismiss the Doe defendants. The opinion was then modified to simply allow respondent to seek that relief in the district court. (831 F.2d at 426, fn. 6.)

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 inasmuch as the district court dismissed the complaint as to the sole remaining defendant and also refused to consider plaintiff's applications for leave to amend.

The Supreme Court may review the judgment by writ of certiorari. 28 U.S.C. § 1254. The only issue, however, is whether the Court of Appeals properly held that the district court should not have dismissed the action without allowing, or even considering, leave to amend the complaint.

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* Petitioner's assertions (Petn. 7) about problems, defenses, immunities, naming the wrong defendant and frivolousness reflect the "gamesmanship" decried by the court below; they are not based on the record.

STATUTES INVOLVED

The only statute involved is 28 U.S.C. § 1653, providing that: "Defective allegations of jurisdiction may be amended, upon terms, in the trial and appellate courts." Denial of leave to amend without "any apparent or declared reason" is not an exercise of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Also relevant is Rule 15, Fed.R.Civ.Proc., mandating that leave to amend pleadings "shall be freely given when justice requires." The federal rules thus reject "the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

STATEMENT OF THE CASE

The record is correctly stated in the opinion below (831 F.2d at 424-426) and is briefly summarized from that opinion:

A. The Action.

This action was brought by the parents of Tony W. Kiser, deceased, to recover damages for his allegedly wrongful death. The initial complaint, filed December 5, 1985, alleged that the decedent, while on active duty as a fireman in the United States Navy, was killed on February 23, 1984, aboard the U.S.S. Guam, which was then stationed in the Mediterranean Sea off the coast of Lebanon. He died from injuries allegedly caused by the failure and malfunction of certain component parts of a hatch that allegedly had been manufactured by the defendants, sold to the Navy and installed on the Guam.

B. Motions to Dismiss.

The initial complaint inadequately alleged the basis of diversity jurisdiction. On February 6, 1986, then-defendant Eaton Corporation moved to dismiss the action for that reason. Petitioner Parker-Hannifin joined in that motion.

C. Deferral of Motions.

On February 12, 1986, the district court held a telephone conference with counsel during which counsel for respondent Kiser was informed that, pending further notice from the court, the pending motions of Eaton and petitioner require no immediate response.

D. Initial Dismissal Notwithstanding Deferral.

On February 19th respondent filed an amended complaint alleging that petitioner was not a North Carolina corporation but failing to specifically allege that petitioner was incorporated in Ohio. The amended complaint inadvertently added Does 1-5. Petitioner filed its answer on March 27, 1986. Notwithstanding the court's direction that respondent could defer any response to the pending motions, the district court thereafter granted the motions to dismiss of Eaton and petitioner for insufficient jurisdictional allegations.

E. Stipulation and Order Vacating Dismissal.

By letter of June 24, 1986, respondent's counsel asked the district court to vacate its dismissal order, referring to the court's February 12th directive deferring consideration of the motions to dismiss. Another telephone conference with counsel and the court resulted in an order vacating the dismissal order of June 9th and a stipulation to dismiss Eaton and then-defendant General Electric.

The stipulation and order further provided (in paragraph 3) that respondent and petitioner shall have thirty (30) days in which to attempt to resolve the claim that diversity jurisdiction is proper; and in the event they failed to agree, "Parker-Hannifin Corporation may move the Court upon the end of the said thirty (30) day period for reinstatement of the Order dismissing the Complaint as to Parker-Hannifin Corporation for lack of diversity jurisdiction and/or lack of properly pleading the existence of diversity jurisdiction."

F. Renewal of Motion.

Respondent's counsel then attempted to obtain consent to amending the complaint to allege that petitioner's state of incorporation is Ohio. On August 28, 1986, petitioner moved to reinstate the June 9th dismissal order. Respondent filed opposition to this motion and requested leave to amend her complaint.

G. Second Dismissal.

On September 23, 1986, the district court granted petitioner's motion on the basis of paragraph 3 of the stipulation. As noted in the opinion below (831 F.2d at 426), the court did not mention and, thus, apparently did not consider, respondent's then pending request for leave to amend her complaint.

H. Renewal of Application for Leave to Amend.

On October 8, 1986, respondent moved for reconsideration of the second dismissal order and again moved for leave to amend her complaint. This motion was accompanied by a proposed second amended complaint stating that petitioner is an Ohio corporation. [As the opinion notes (831 F.2d at 429, fn. 7), petitioner's counsel professed ignorance of this fact even at the oral argument in the Court of Appeals.] Petitioner opposed this motion, asserting for the first time that the Doe defendants destroyed diversity of citizenship.

I. Denial of Reconsideration and Leave to Amend.

On December 11, 1986, the district court denied respondent's motion for reconsideration and affirmed the second dismissal order, basing its ruling on a misreading of the stipulation as mandating dismissal absent a stipulation for leave to amend. The final dismissal order did not mention respondent's renewed motion for leave to amend her complaint.

REASONS FOR DENYING THE WRIT

I

THE SOLE ISSUE IS THAT OF REFUSAL TO CONSIDER LEAVE TO AMEND THE COMPLAINT

The "gamesmanship" deplored by the Court of Appeals (831 F.2d at 429) is carried to extremes in the petition. There is no issue about the propriety of Doe pleadings in federal courts. Respondent does not claim, and the court below did not hold, that Doe pleadings are permissible. All these contentions about federal practice and Doe allegations (Petn. pp. 9-11) are sham.

Only two questions were presented to and decided by the court below. One question was "whether the district court erred when it failed to consider Kiser's motions for leave to amend her complaint prior to addressing Parker-Hannifin's motions to dismiss." 831 F.2d at 426. The decision was that the court's "outright refusal to grant Kiser leave to amend" was "without justification" and "is a clear abuse of discretion and is inconsistent with the spirit of the Federal rules, *see Foman*, 371 U.S. at 182, especially where the motion for leave to amend the complaint is accompanied by an amended complaint that may properly be relied upon for relief." 831 F.2d at 428.

The second question was "whether the district court properly dismissed Kiser's complaint." 831 F.2d at 428. The Court of Appeals concluded "that the district court erred as a matter of law when it granted Parker-Hannifin's second motion to reinstate the June 9th dismissal order and denied Kiser's motion to reconsider." 831 F.2d at 428.

The court below did not suggest that there is any basis in the federal rules, or otherwise, for Doe practice or pleadings. On the contrary, the court authorized respondent to seek leave to amend to dismiss the Doe defendants. The opinion below also noted the view of Judge Becker that Doe defendants should be "dismissable as a matter of course in federal diversity litigation." 831 F.2d at 426, fn. 6.

The assertion that the district court "gave the plaintiffs several opportunities to amend their complaint" (Petn. p. 13) is another "gamesmanship" gambit. Respondent was given *no* opportunity

to amend. Having once amended, respondent could not amend again without leave of court and the district court refused to even consider respondent's applications. 831 F.2d at 427.

II

REFUSAL TO CONSIDER LEAVE TO AMEND WAS AN ABUSE OF DISCRETION

The court below properly applied the federal rules (Fed.R.Civ.Proc., Rule 15) and the federal statute (28 U.S.C. § 1653) in holding that it was an abuse of discretion to refuse to even consider respondent's motions for leave to amend her complaint to remedy the minor flaws therein. As noted in *Foman v. Davis, supra*, 371 U.S. 178, 182:

> "... but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

The question is *not* one of subject matter jurisdiction. Petn. p. 11. The question, rather, is one of *amending* the complaint to allege the *true* jurisdictional facts. The statute (28 U.S.C. § 1653) expressly authorizes such amendments.

III

THERE IS NO CONFLICT WITH THE BRYANT DECISION

There is no conflict in the circuits, and particularly no conflict with the decision in *Bryant v. Ford Motor Co.*, 832 F.2d 1080 (9th Cir. 1987), concerning federal Doe practice. The opinion below does *not* sanction any such practice. On the contrary, the Court of Appeals initially dismissed the Doe defendants at the request of respondent and thereafter modified the opinion to allow respondent to seek that relief in the district court.

Bryant simply held that removal of a state court action was premature because the complaint contained Doe defendants as parties. 832 F.2d at 1084. There *the defendant* sought to invoke

federal diversity jurisdiction notwithstanding that plaintiff did not seek dismissal of the Does. In contrast, federal jurisdiction was here invoked *by the plaintiff* and, having added Doe defendants through routine California practice, the plaintiff sought to retain federal jurisdiction by voluntary dismissal of the Does. *Bryant* expressly recognizes that federal jurisdiction would exist upon such dismissal. The Ninth Circuit held that "the 30-day time limit for removal contained in 28 U.S.C. § 1446 will not commence until all Doe defendants are either named, unequivocally abandoned by the plaintiff, or dismissed by the state court." 832 F.2d at 1083.

The Doe defendants in this case were inadvertently added and have been "unequivocally abandoned by the plaintiff." There is, thus, no conflict with *Bryant*.

CONCLUSION

There is no reason for granting certiorari to review the simple question of whether the district court abused its discretion in refusing to even consider respondent's requests for leave to amend the complaint to cure minor flaws in the jurisdictional allegations. No other question is presented. The Court of Appeals did not purport to sanction any federal Doe practice. There is no conflict between the circuits. As *Bryant* itself recognizes, federal diversity jurisdiction, if otherwise present, will attach when the Doe defendants are "unequivocally abandoned by the plaintiff." The Doe defendants were inadvertently added and have been "unequivocally abandoned." The petition should therefore be denied.

Respectfully submitted,

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